the right to the teachings of a virtuous and not a depraved mother to his children. If he entrusted their care to a virtuous and undefiled mother, and a party corrupts and debases her, he thereby becomes liable for the neglect to her family and her example to her children, and the fact that the wife dies, does not deprive him of his right to a recovery: *Yundt* v. *Hartranft*, 41 Ill. 12, 13.

Damages may also be increased or diminished by circumstances, as the rank and fortune of the plaintiff and defendant, the seduction of the wife founded on her previous behavior and character.

Again—In proof of damages, the relation of friendship, blood, confidence, gratitude and hospitality which subsisted between the plaintiff and defendant, may be shown.

Sedgwick and many other writers, including Greenleaf and Phillips on Evidence, lay it down as a rule that the amount of reparation in no sense is to be measured by the defendant's property, and evidence that the defendant is a man of large fortune is inadmissible. But that is not the law in Illinois, as that point was expressly decided in the recent case of *Peters* v. *Lake*, reported in 6th Legal News, p. 13.

ELLIOTT ANTHONY.

CHICAGO, Jan. 1876.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

SCHULTZ'S APPEAL.

Where an absolute estate is devised, but upon a secret trust assented to by the devisee, either expressly, or impliedly by knowledge and silence before the death of the testator, a court of equity will fasten a trust on him on the ground of fraud, and consequently the statute of mortmain will avoid the devise if the trust is in favor of a charity.

But if the devisee have no part in the devise, and no knowledge of it until after the death of the testator, there is no ground upon which equity can fasten such a trust on him, even though after it comes to his knowledge he should express an intention of conforming to the wishes of the testator.

A testator, being ill, sent for a scrivener to draw a will, dividing his property among certain charities; upon being informed that it would be avoided by his death within thirty days, but that by bequeathing it absolutely to a man whom he could trust, the same result might be attained, he executed a will giving all his estate to Y., who, he was confident, would execute his wishes, but who had no knowledge of the will or its contents until after his death, which occurred within thirty days. Y. admitted, on examination, that he felt a moral obligation to

devote the property to the charities which a witness present at the execution of the will informed him were those meant by the testator. *Held*, that the bequest to Y. was good, and not within the provisions of the Mortmain Act of 26th April 1855.

CERTIORARI to the Orphans' Court of Montgomery county.

Frederick Schultz died in 1872. The paper containing the following residuary bequest was offered for probate as his will, and objected to upon the ground that it had been obtained by undue influence: "As touching all the rest and residue of my estate, I give and bequeath the same to Reuben Yeakle, of Cleveland, Ohio, and his heirs and assigns for ever." An issue *devisavit vel non* was directed, and determined in favor of the validity of the will, which was then admitted to probate.

Upon the filing of the executor's account, there was found to be a balance of $10,043, after payment of debts. Before the auditor appointed to audit this account, there appeared the next of kin of testator to claim that this balance should be distributed according to the intestate laws, because the will, though in terms an absolute bequest to Yeakle, was an attempt to evade the act of 26th April 1855 (Purd. Dig. 1477, pl. 22), and to create a charitable trust. The auditor reported the facts (which are sufficiently set forth above and in the opinion), and a decree awarding the fund to Yeakle. This report was confirmed by the court below, and the next of kin appealed.

C. Hunsicker and *G. R. Fox*, for appellant.—By this will the testator attempted a fraud upon the law. The English doctrine, that parol evidence is inadmissible to vary or contradict a written will, has been much modified in Pennsylvania: *Rearick* v. *Swinehart*, 1 Jones 233; *Hoge* v. *Hoge*, 1 Wright 163. The older English authorities are conclusive that an attempt like the present to evade the statute of mortmain would have been thwarted: *Boson* v. *Statham*, 1 Eden 512; s. c. 1 Cox 16; Shelford on Mortmain, sect. 143–147; *Willard* v. *Hawthorn*, 2 B. & Ald. 96; *Doe* v. *Wright*, Id. 721. The late English cases relied upon by the court below have never been recognised in this state, and are an abandonment of the earlier doctrine.

B. M. Boyer, contrà.—The Act of 1855 is a copy, in principle, of 9 Geo. II., c. 36: *McLean* v. *Wade*, 5 Wright 266. Under this act the cases clearly establish the principle, that if there is no trust which equity could enforce against the legatee if the will had been made in accordance with the provisions of the statute, then

there is no fraud upon the law. The gift is the absolute property of the legatee; if he devotes it to charity it is his own gift, not the gift of the testator—and cited *Adlington* v. *Cann*, 3 Atk. 144; *Mucklestone* v. *Brown*, 6 Ves. 52; *Strickland* v. *Aldridge*, 9 Id. 516; *Loma* v. *Ripley*, 3 Sm. & Gif. 48; *Paine* v. *Hall*, 18 Ves. 475; *Walgrave* v. *Tebbs*, 2 Kay & J. Ch. 313.

The opinion of the court was delivered by

SHARSWOOD, J.—The very able and exhaustive opinions, as well of the auditor as of the learned court below, have relieved us from an examination of the English decisions upon the mortmain act of that country. They undoubtedly throw a clear and strong light upon the question presented upon this record. They establish two positions: 1st. That if an absolute estate is devised, but upon a secret trust assented to by the devisee, either expressly, or impliedly by knowledge and silence before the death of the testator, a court of equity will fasten a trust on him on the ground of fraud, and consequently the statute of mortmain will avoid the devise if the trust is in favor of a charity. But, 2d. If devisee have no part in the devise, and no knowledge of it until after the death of the testator, there is no ground upon which equity can fasten such a trust on him, even though after it comes to his knowledge he should express an intention of conformity to the wishes of the testator.

The latter proposition applies directly to the case now before us. Reuben Yeakle, the legatee named in the will, was not present when the instrument was executed. He had no communication with the testator directly or indirectly upon the subject. The testator had long intended to leave his estate for charitable purposes. On his death-bed he sent for a scrivener, and expressed to him his wish to have his property so disposed of after his death. He was informed that if he should die within thirty days such a disposition would be ineffectual, but that he might make an absolute bequest to some individual, upon the confidence and belief that when he should be informed of his wishes he would, of his own accord, carry them out. This plan was adopted, and, upon the suggestion of one of the by-standers, Reuben Yeakle, the bishop of the church to which decedent belonged, was chosen by him.

It is clear, not only from the evidence, but from the verdict of the jury in the issue of *devisavit vel non*, that no undue influence was exercised to procure the will. It was the testator's own free

and voluntary act, and he was "told he could dispose of his property to a particular person unconditionally, and if that man would do it then he could put it to those places where he wanted it; but that would be entirely at his option; he could do it or not." Reuben Yeakle was not informed of the will until some time after the death of the testator. When informed of it he declared his intention to appropriate the money as the testator wished it to be. He said, when examined as a witness before the auditor, "I have not seen the will, but if it gives me the absolute right to the property without condition, I should consider that I had the legal right to do with the property as I pleased. I draw a distinction in this case between the legal and moral right."

We are unshackled by authority on this question. The English precedents upon the construction of their statute of mortmain are not binding upon this court, and with us the question is an entirely new one. By the 11th section of the Act of Assembly of April 26th 1855 (Pamph. L. 332), it is provided that no estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body-politic, or to any person, in trust for religious or charitable uses, except the same be done by deed or will attested by two credible, and at the time disinterested, witnesses, at least one calendar month before the decease of the testator or alienor, and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee, next of kin or heirs according to law.

It seems very clear that the bequest in the will of Frederick Schultz to Reuben Yeakle is not within the words of this statute. There is nothing in the circumstances to fasten a trust upon him. The statute out of the way, the charities intended to be benefited would have no claim, legal or equitable, to enforce payment by him to them. He would, in the eye of the law, be guilty of no fraud, legal or equitable, either against them or the testator, if he should even at this day change his intention and apply the money to some other use. Being the absolute owner under the will, the declaration of his intention would not be binding upon him. It is not, therefore, in the words of the statute, a bequest "to a body-politic or to any person in trust for religious or charitable uses." Had Reuben Yeakle been present when the will was executed, or the object of the bequest been communicated to him before the testator's death, and he had held his peace, there would have been some ground for fastening a trust upon him *ex maleficio*, as in

Hoge v. *Hoge*, 1 Watts 163. But nothing of that kind can be pretended here.

It has been contended, however, very strenuously, that as Edward Schultz proposed Reuben Yeakle to the testator as the man, the acceptance of Reuben Yeakle of the bequest recognised Edward Schultz as his attorney, and ratified whatever he had said and done. They urge the maxim, *omnis ratihabitio retrotrahitur et mandato equiparatur.*

It is very ingenious contention, but, unfortunately for the appellants, there is nothing in the evidence upon which it can be built. Edward Schultz did not undertake for Reuben Yeakle. He gave the testator no assurance that he would accept and carry out his intention when made known to him. He says: "I proposed Reuben Yeakle, so far as I remember, as the man. Frederick then agreed to Reuben Yeakle. Reuben Yeakle was considered to be an honest man, and it was for this reason he was taken, and because he was acquainted with these societies mentioned. As far as I can recollect I said that through Yeakle his desire could be carried out in the distribution of his property. The object was to carry out the wish of Frederick in that way. There was a chance to carry it out in that way if the legatee was willing, and Reuben Yeakle was selected because it was thought he would agree to it."

There is nothing in all this which indicates any promise or assurance by Edward Schultz to the testator that Reuben Yeakle would accept the bequest in trust for the charities. There was the mere expression of an opinion, concurred in by the testator, that when the legatee came to understand the object and purpose of the bequest to him, as an honest man he would carry out the intention of the testator.

It is urged, however, that this whole plan is nothing but a contrivance to evade the statute. No doubt such was the intention of the testator. It is said that it is a fraud upon the law, and that the bequest ought, therefore, to be declared void. But that overlooks the fact that the absolute property in the subject of this bequest was vested in the legatee, and that he is entirely innocent of any complicity in the fraud of the testator. If the statute is practically repealed by this construction it is evident that it must be for the legislature to devise and apply a remedy, not the judiciary, whose province is not *jus dare*, but *jus dicere.*

Decree affirmed and appeal dismissed at the cost of the appellants.

We are not surprised that the party against whom this decision was made, and probably many others, should look upon it as leaving open a mode of escape from the statute which looks very much like an evasion, and one which ought to receive no countenance from the courts. But after careful study of the decision we confess our inability to comprehend how it could have been otherwise. Indeed we do not see that the legislature could, with any proper regard to the freedom of testators in disposing of their estates by will, have made any special provisions against bequests of the character in question in the principal case. It was nothing more than giving the estate to the devisee absolutely, with no trust whatever, and no communication with him. The argument and the English cases show: first, that such a bequest made in trust for the illegal object is equally void, as if made directly to an institution of the character specified in the statute: *Strickland* v. *Aldridge*, 9 Vesey 516; secondly, that it is not required that the trust should appear upon the face of the will, but that it may be shown by extrinsic evidence: *Doe d. Willard* v. *Hawthorn*, 2 B. & Ald. 96; thirdly, that by the English law, not only the illegal trust is avoided, but the devisee is compelled to disclose it, and to stand as trustee for those entitled to the estate, independently of the illegal bequest: *Doe* v. *Wright*, 2 B. & Ald. 721. And it is equally well settled, that it is not required there should have been any express contract to execute the trust on the part of the trustee; the mere expectation and understanding on the part of the testator, that the estate would be applied by the trustee according to his wishes, if this were made known to the trustee, the consent to accept the bequest, knowing the ground of the testator's action, will be sufficient to create the illegal trust. It may therefore seem surprising to some, that when all these facts exist in the present case except the knowledge and assent of the trustee, before the decease of the testator, there should be any legal difference in the result, especially as the trustee now avows the purpose of applying the estate according to the wishes of the testator. The case no doubt has, to unprofessional persons, something of the appearance of an evasion of the statute; which in one sense it is, since that was the purpose of the testator and the result accomplishes it. But it is not accomplished through any legal force of the will. The devisee is not a trustee in any sense, and may do with the estate as he chooses. It is a clear gift, over which the law has no control. He may do what he will with his own and it will be no violation either of the statute or any other law. The point of decision may be somewhat narrow, but is clearly sound and in accordance with the latest English authorities: *Hawkins* v. *Allen*, L. R. 10 Eq. 246; *Jones* v. *Bradley*, L. R. 3 Ch. App. 362.

In the very recent case of *Kenrick* v. *Cole* (not yet reported), the Supreme Court of Missouri, having before it a somewhat similar attempt to evade the mortmain act, reached a different result upon the facts. In that case the testatrix made a will, leaving her property to Archbishop Kenrick for the benefit of the Catholic Church. Upon the adoption of the Constitution of 1865, which prohibits any devise or bequest for the support, use or benefit of any minister as such, or any religious sect, testatrix made a new will, devising the property to Peter Richard Kenrick, as an individual, absolutely, without naming any trust. The court held that this was a fraud on the law and void.

But the decision is not in conflict with

the principal case, as Archbishop Kenrick knew of the devise during testatrix's life, and there was evidence that he had declared he would carry out her intentions, and that such declaration was reported to her. The very case arose therefore which is put by Judge SHARSWOOD as one in which the court would fasten a trust on the devisee, and therefore the mortmain act would operate.

I. F. R.

Supreme Court of Vermont.

THE STATE EX REL. JOHN B. PAGE *v.* J. GREGORY SMITH ET AL.

The fact of merger depends largely on intention, and this rule applies to a case where a corporation purchases shares of its own stock. The purchase suspends the right to vote on the shares, and may be a merger if so intended; but if not so intended, it is not a merger, and the presumption is that the corporation does not intend a merger, but to hold the stock as assets, or to sell and reissue it.

A quorum of the directors of a corporation are competent to act within the scope of their powers and to bind the corporation, although the meeting was not regularly called and there was no notice to the other directors.

A sale of the company's shares of its own stock, made at such a meeting of the directors, if made *bonâ fide* and for full value, and for the purpose of raising money to meet an urgent necessity of the company, passed a good *primâ facie* to the shares, and could only be set aside for cause, upon a direct proceeding for that purpose. Any director or stockholder desiring to avoid such sale, must proceed at once to dispute it in legal form; acquiescence until the consideration has been appropriated to the benefit of the corporation, is a ratification of the sale.

If the sale is otherwise valid, it is not vitiated by the fact that the motive of the purchaser and of some of the directors was to enable the former to vote upon the shares in a certain manner at an approaching election of corporate officers.

Where new stock is issued which is to share in profits with existing stock, all the holders of the latter have an equal right to subscribe for their proportionate part of the new stock, but this rule does not apply to original stock bought in by the corporation and held as assets, and sold for the payment of liabilities or for the general benefit.

MOTION for leave to file an information.

In April 1873 cash subscriptions were made to the capital stock of the Central Vermont Railroad, which were accepted by the commissioners and the stock allotted to the several subscribers. In May the company was organized, and in the same month it was appointed by the Court of Chancery receiver of the Vermont Central and Vermont and Canada Railroads.

Some of the subscriptions had been made by one Park in the names of parties who subsequently repudiated his authority and refused to accept the shares, whereupon Park assumed them himself, and the shares were entered on the stock ledger in his name.

In January 1874, having been advised that they could not cancel these subscriptions, the directors purchased the shares for the company, and had the shares entered in the company's name.

On May 18th 1875, a directors' meeting was called by telegraph, for half past one o'clock at Bellows Falls. This was adjourned for want of a quorum, until four o'clock the same day, on the directors' car, then on a trip for inspection of the road. At four o'clock, a quorum being present in the directors' car, a vote was passed for the sale of the shares held by the company to Langdon and Millis, who were already large stockholders. The shares were paid for by the purchasers and transferred on the company's books on the morning of May 19th, and the purchase-money was appropriated by the directors to the payment of a debt of the company then due and urgent. To raise funds to pay this debt was the reason assigned for the sale of these shares by the directors. On the same day, however, May 19th, there was an election for directors of the company, and it was charged in the present petition that the respondents were elected directors by the votes of Langdon and Millis upon these shares (amounting to 2350), and that the said votes were illegal and the election void.

Daniel Roberts and *E. R. Hoar*, for the relator.

B. F. Fifield and *L. P. Poland*, for the respondents.

1. Corporation may buy its own stock and sell again: *City Bank* v. *Bruce*, 17 N. Y. 507; *Williams* v. *Manufacturing Co.*, 3 Md. Ch. 451; *Robinson* v. *Beall*, 26 Ga. 28; *Taylor* v. *Miami Co.*, 6 Ohio 219; *United States Trust Co.* v. *Harris*, 2 Bosw. 90.

2. The sale was legally made, and at a legal meeting. A meeting regularly called for one place and having no quorum may adjourn to a different place: 8 Cowen 286; 1 Selden 22. Even if there was irregularity in this adjournment the annual inspection trip of the directors in their car is a regular business meeting. Failure to notify the others not present in the morning will not make the meeting illegal: *Bank* v. *Railway Co.*, 30 Vt. 169.

3. There was no pre-emption right in the other stockholders as to these shares: R. M. Charlton 260; 3 Md. Ch. 418.

4. The sale was in good faith to raise money for a debt of the company. Even if there was another incidental motive it is of no consequence. The motive of a legal act is immaterial: *South Royalton Bank* v. *Suffolk Bank*, 27 Vt. 505.

The opinion of the court was delivered by

REDFIELD, J.—This is a petition of the states-attorney for Franklin county for leave to file an information in the nature of a writ of *quo warranto* against the respondents for usurping and exercising the rights of directors of the Central Vermont Railroad. A rule to show cause having been obtained and served on the respondents, the question now comes up whether this court will grant the leave asked.

I. A preliminary question has been discussed, whether, if insufficient cause be shown and leave is granted, a judgment of ouster will be awarded as a matter of right, or as a matter of course. It is not denied that at the time our statute was enacted, and down to the present time, the practice was settled and uniform in the courts of England, that after leave was granted and the information filed, the respondents had time and opportunity to plead to the information. The nature of the application is summary and requires speed, and the court will see to it, that there be no needless delay. The 4th sect. of the Statute of Anne required "proceeding at the most convenient speed that may be," and "an appearance and pleading as of the same term at which the information shall be filed." But the practice in the English courts under that statute was, when the information was filed, if there was not voluntary appearance, to require such appearance by *venire facias*, or compel it by *distringas*. The rule requires the respondents to show cause why an information should not be filed against them; if they omit to show cause, as they may, the rule becomes absolute, and the information is filed.

In the *People* v. *Robinson*, 4 Cow. 97, the respondent had been adjudged guilty upon default of appearance to show cause, and ouster awarded. The court held the judgment irregular and without due process of law, and set it aside as irregular and void. It is noticeable as having been ably argued by the attorney-general on the one side, and *John C. Spencer* on the other, and thoroughly sifted by the court. We think when an information is allowed to be filed, it is the duty of the court to fix some time, ordinarily during the same term, for the respondents to appear and plead; and if they do not voluntarily do so, their appearance will be compelled by due process of law. In *State* v. *Hunton et al.*, 28 Vt. 594, the court, BENNETT, J., questioned the propriety of rendering final judgment of the guilt or innocence of a party on a rule to

show cause why an information should not be filed, and maintained that the rule of practice was otherwise, unless the court should of its own motion institute a new and independent practice of its own. But in that case no question was raised, and, by mutual consent, the parties submitted the whole case upon its merits.

In *State* v. *Bradford*, 32 Vt. 50, the respondents disclaimed any right or title to the offices in question; and the pretended and *de facto* corporation appeared, but made no answer, and asked to have the case decided upon the proofs of the states-attorney. There was no relator upon the record, as the court said should have been. The proof being ample, and the parties appearing and making virtual confession of the truth of the allegations and disclaimer of title to the offices, the court, by implied consent, made an order for the dissolution of the pretended corporation and the ouster of the disclaiming officers.

The statute gives, merely, jurisdiction to this court of these prerogative writs, and prescribes no forms or rules for proceedings, but, by manifest implication, adopted the function and manner of use of the proceedings then uniformly practised in the common-law courts of England.

The analogy of practice in *certiorari* is urged upon us. The analogy is not obvious. The inquiry in the application for *certiorari* is based on the record, and is a substitute in sessions matters for the writ of error, which applies only to common-law procedure. The court examines a copy of the records upon which it is claimed that an erroneous judgment has been rendered in the inferior court; and if the court finds error, it will order the record to be certified into this court, and render thereon such judgment as should have been. The record imports verity, which neither party can dispute.

II. This proceeding is criminal in its form, but civil in its nature, and is addressed to the judicial discretion of this court. It may be allowed or denied, in consideration of rights and consequences, the condition of the property, and its owners, and its relation to the public.

The case discloses that the said corporation has, by the court of chancery, been made receiver, and holds in trust the Vermont Central and Vermont and Canada Railroads, and is operating, under leases, several other railways in this and other states. The trust duties thus imposed are active and executive in their nature, in-

volving important duties and responsibilities, both to the *cestui que trust* and the public, and incurring, necessarily, from day to day, large liabilities in intricate and often complicated transactions in the administration of the trust, which, from the nature of the case, must be largely outstanding and unsettled. One of the incidents of a receivership is a bond, commensurate with the magnitude of the trust, approved by the court of chancery, and to respond to that court for the property, its income, and for all laches of administration. Such bond is presumed to have been furnished by those who have assumed the duties, and have been the active administrators of the trust. If the present incumbents should be ousted, they would have the right to require that their personal liability, by bond or otherwise, should cease with the ouster; and the chancellor would doubtless require new bonds, to respond for any laches of administration. How far personal character, capacity and responsibility, induced the appointment of this corporation as the receiver of this large property and executive trust, is known only to the chancellor. The Court of Chancery has absolute control of the trust and its administrators, and may so temper any order as to restrain wrong and insure justice, while this court has no power, upon this application, but to grant or refuse the petition. Without discriminating as to the fitness or unfitness of *men* for the administration of so important a trust, it is easy to foresee that it is possible for complicated questions to arise between the outgoing and incoming directors as to liability and responsibility, and for a litigation to spring up, subjecting the trust to new burdens, without benefit to the parties or the public. We have no warrant for saying that such mischief would necessarily follow; but to some extent it is possible, and perhaps probable; and though not of controlling weight when there is satisfactory proof that the office has been usurped by force or fraud, yet they are proper matters for consideration in the exercise of that judicial discretion which the petitioners invoke.

III. The *right* of the respondents to hold and exercise the office of directors of this corporation, depends upon the legality of the 2350 votes cast by Langdon and Millis on the stock in question. If such votes were lawfully cast, the respondents were duly elected directors, otherwise not.

Waiving, for the present, all consideration of the alleged conspiracy on the part of the respondents, to forestall by fraud the

majority of the stockholders in the election of the 19th of May last, and assuming that the transaction had wholly occurred six months before, and without reference to an immediate election, we inquire whether Langdon and Millis stand as purchasers and owners of such stock in this corporation

Mr. Park and associates in New York had agreed with Governor Smith and associates in Vermont, that they would subscribe for 20,000 shares of stock in this corporation, in certain agreed proportions. Park, in executing his part of the contract, signed in the names of two friends in New York, 1500 shares without authority, which they repudiated. Whereupon Park assumed such subscription as his own, and the stock was entered upon the books of the corporation as belonging to Park. It is urged that this stock having first been subscribed in the name of Myers and McKinney, was their stock, and that Park, showing no written assignment, had no title or property in it. But Myers and McKinney repudiated the subscriptions, for the reason that Park was without authority to bind them by such contract. Park having subscribed for stock, by an assumed agency not founded in fact, failing to bind the principal, bound himself. The five per cent. paid by Park was then placed to his credit by the corporation, and the subscriptions placed on the books as a subscription by Park in his own right. Park was then not only the equitable owner, but the original subscriber for the stock. The corporation had been made the receiver of this large property, upon the representation that 20,000 shares of stock had been *bonâ fide* subscribed. Park claimed that the corporation ought to relieve him from holding and carrying the stock subscribed in the name of Myers and McKinney; and certain other parties made similar claims. For certain reasons—and we have no right to assume that such reasons were inadequate or improper—the corporation purchased 2350 shares of such stock, and placed it on their books as stock belonging to the corporation, like other assets. It is claimed that thereby said stock became *merged* and extinguished. The intent of the parties, and especially of the corporation, is important in determining the character of such transactions.

The corporation had no right to diminish its capital stock, and especially so under the circumstances of its receivership. And the evidence concurs, that the corporation *purposed*, under advice of counsel, to hold the stock thus purchased as not merged, but sul-

sisting as assets on the books of the company. We think the legal effect of such transfer of the stock is fairly and correctly stated by the court in *Williams* v. *Savage Manuf. Co.*, 3 Md. Ch. Dec. 451, to which we have been referred by counsel for the petitioners; and in the case of *Bank of Columbus* v. *Bruce et al.*, 17 N. Y. 507, referred to by the respondents. In the latter case, SELDEN, J., says: "It might or might not have that effect—extinguish the stock—at the option of the company. I think some manifestation of such intent should be proved, to produce that result." And again he says: "I see nothing to prevent the re-issue and sale by the company of the stock so transferred; and, in the absence of any proof to the contrary, the presumption is that the directors intended to act within the scope of their powers by selling the stock on hand, instead of issuing new stock, which they had no power to create." In the former case, the chancellor says, after reviewing the cases on the subject: "But it does not follow that though the shares transferred to the corporation are merged for the time being, that they may not be subsequently revived; * * * and whatever may be the temporary legal effect of the transfer, it has always been supposed, and the practice has always been with such general understanding, that they were authorized to revive the stock when they saw fit to do so." The sale and transfer of stock, if done by proper authority, and if it was actual and not colorable, and not affected by any secret trust, if a *bonâ fide* and absolute sale, vested in the purchasers the title to the stock, with all the incidents, including the right to vote upon it.

IV. Was the property sold and transferred to the purchasers by such authority as should bind the corporation? We think the majority of directors who assembled on the directors' car and passed the resolutions authorizing the sale of this stock, to meet a liability becoming due on the first of June after, cannot, lawfully, be claimed as organized under the call of the clerk to meet at Bellows Falls, at an earlier hour of the same day. If we should hold that the call of the clerk by telegraph was in accordance with the by-laws, and the time sufficient, we think the attempted adjournment by a minority, to a point fifty miles distant, was irregular, and did not transfer the place of legal *venue* under that call to White River Junction. But a quorum of the directors, regular in form, assembled on the cars, and by resolution, authorized the sale of this stock, and under that authority the stock was sold,

and, as the proofs stand, for adequate and full consideration received by the company.

In *Bank of Middlebury* v. *R. & W. Railroad Co.*, 30 Vt. 169, the court held that the action of a majority of the directors of a corporation, without any notice to the other directors, if within the scope of their authority, was legal, and bound the corporation, and the court says, that "if the authorized agents of the company have extended its business beyond the strict limits of their functions for which the charter was granted, the company has been bound by the extension, unless the corporators interfere to restrain such extension at the earliest moment." See also *Stark Bank* v. *Union Potter Co.*, 34 Vt. 145.

The railroad provisions of our statute provide, p. 216, sec. 3, "That the government and direction of the affairs of every such corporation, shall be vested in a board of not less than five, * * * and a majority of the directors shall form a board, and shall be competent to transact the business of the company." By the express language of the statute, a majority of the directors are constituted a board, with full authority to do what all the directors when assembled could do in "the affairs of such corporation and in the transaction of the business of the company." In *Edgerly* v. *Emerson*, 3 Foster 555, a very well reasoned case, it was held that when a majority of bank directors are by the statute constituted "a board for the transaction of business," that "such board, when assembled, possess all the powers of the entire board of all the directors." The statute of New Hampshire declared that "no less than four directors shall constitute a board for the transaction of business." In that case, BELL, J., says: "There was before no difficulty except as to the point of notice, and the only useful effect of the statute provision relative to a quorum, or the powers of a majority, is, to give them the authority to act in the absence of others and without notice to them. We are therefore of the opinion that when the quorum of a bank meet and unite in any determination, the corporation is bound, whether the other directors are or are not notified." We think that the vote of the majority of the directors thus assembled, was a lawful vote of the "board of directors competent to transact the business of the company;" and if this transfer of the stock was not a transfer merely, but a sale, beneficial to the company, and *bonâ fide*, it vested in the purchaser a title to the stock; and though the "board" of directors

that authorized the sale, was under no regular call, and the two members of the finance committee who effected the sale, may have been personally interested, and moved by partisan influence, yet, if the stock was the principal available assets to meet an impending liability, and was sold for full value, the sale was, at most, voidable only, and could be impeached for cause only, on the seasonable motion of the party claiming to be injured.

The case discloses that the relator was not only a large stockholder, and representing, as he claims, a majority of the stock, but was himself elected one of the directors on the 19th of May, and had been, up to that time, vice president, and chairman of the finance committee. He was aware of the resolution of the directors, and the claim therein that the stock was sold and the money paid to meet the instalment due by contract in a few days for the purchase of the property of the Vermont and Canada Railroad Co. Whether it was necessary to sell this stock, is left on the proof to the parties to the sale, who aver that it was necessary, and that the sale was actual, *bonâ fide*, made for that purpose, without any secret trust, or understanding that the purchase-money was to be returned, or that the purchasers had any other equivalent for their money than the stock thus purchased. So far as this case discloses, there is no question that the money paid for the stock went to the use of the corporation; and all parties have acquiesced in the sale, unless this proceeding may be supposed to have brought it in question. The relator could, then, elect to challenge the validity of the sale and take proceedings to avoid it, and demand that it should be annulled by a return of the consideration to the purchasers, or he could acquiesce in the sale, and allow the consideration to go to the use of the corporation. But if a member of a corporation and associate director claims that the directors, as agents, have exceeded their functions in selling property in derogation of the rights of the corporation, that claim must be seasonably asserted, in a manner that shall bind the parties to such sale; acquiescence would confirm the sale; and allowing the consideration to be appropriated to the use of the corporation, would adopt and ratify it.

It may be claimed that this proceeding to oust certain directors on the ground that they were elected fraudulently by votes upon this stock, is, virtually, a proceeding to avoid this sale. The purchasers are not made parties; Langdon's election is conceded;

Millis never was a director, and claims to be a stockholder by virtue of the ownership of this stock. Whatever may be the order of the court in this case, it could have no effect upon the rights of Langdon and Millis. Suppose a new election should be ordered, as under statute law is the practice in many of the states, and Millis offering his votes on this stock, should be challenged. It could not be claimed, upon any evidence or suggestion in this case, that if the purchase of this stock was voidable, it had not been fully confirmed by acquiescence, and allowing the purchase-money to go to the use of the corporation.

V. It is insisted that there was a pre-emptive right in all the stockholders to purchase a proportionate share of this stock. We are referred to *Gray* v. *The Portland Bank*, 3 Mass. 364, and Ang. on Corp., secs. 554–5. The two sections in Angell seem entirely based upon the former case, and the text is but a quotation from the opinions of SEWELL and SEDGWICK, JJ., who gave the opinions of the court in the case. In that case the plaintiff Gray was a large owner of stock in a banking corporation under a charter that authorized the corporation to issue stock, not less than $100,000, nor over $300,000. The corporators organized under the lesser capital, purchased a banking house, and had accumulated a surplus of profits. The stockholders then voted to enlarge their capital and issue the residue of the stock allowed by their charter, and constituted the directors a committee to issue and distribute the residue of such stock to the existing stockholders. The plaintiff, being a large owner of the stock first issued, and a proportionate owner of the surplus profits of the bank, which was an incident of his stock, tendered the money to said committee, and demanded his proportionate share of the new issue of stock, and was refused. He then sued the bank, in assumpsit, for his share of the dividends on such stock, and for damages for refusal, claiming it to be a breach of contract. The court held that the plaintiff could not recover dividends, because the stock was not owned by the plaintiff; but a good title thereto was vested in the subscribers to whom the directors had distributed it. 2d. The court held that the directors, in issuing new stock to strangers, and thereby making them share-owners in the existing surplus profits, a fixed share of which was then owned by plaintiff, was a wrong to him, for which he might recover.

When *new* stock is issued, which shares equally with the existing

stock, the shareowners have a right that it shall be so distributed as not to divest any stockholder of his present vested right in property; and the proportionate share of the accumulated profit is represented by the shares, and is vested property, as much as the shares themselves. We entirely accord with the reasoning of this case. And if the cases were analogous in their facts, by this authority Langdon and Millis became and are the undisputed owners of the stock in question. But this was not a new issue of stock, but a portion of the original subscription, and its identity has been preserved, as we have shown. The transfer of the stock to the corporation suspends the right to vote upon it, and may be a merger, if so understood by the parties. The right of the directors to reissue or sell such stock for honest purposes and for the benefit of the corporation, is reasonable, and amply sustained by authorities. See opinion of DAVIES, J., in *Hartridge et al.* v. *Rockwell et al.*, R. M. Charlton (Ga.) 260.

VI. It is insisted that this stock was transferred for the purpose of giving the preponderance of votes to the respondents. We have no doubt that such motives were strong inducements at the time, and that the respondents were determined to resort to every lawful agency to maintain their position, and repel the movement of the relator. We have no opinion of the merits of the controversy, or of the wisdom or propriety of the acts of the parties, as disclosed by the testimony. There are some matters disclosed, which, in the forum of conscience, would be obnoxious to criticism, that are not unlawful, and are not properly brought in question in this proceeding. The case shows that the stock was not merely transferred, but sold; and that the sale was actual, not colorable; and that there was no secret trust or condition; that the sale was for a necessary purpose, and beneficial to the company; that the full value was to be paid to the corporation, which has gone to its use. We think such sale is not void, but, like any other sale, can be impeached only for cause. And that the controlling inducement for the purchase, at the time, of the stock was, to enable the purchaser and his friends to out-vote the relator and *his* friends, does not vitiate the sale, if otherwise for honest purposes, and for full value. We think also, that the consideration having gone to the use of the corporation, without challenge or seasonable proceedings to rescind or avoid the sale, the sale has become ratified and adopted by acquiescence. And we do not think that the reasons

and principles that have guided this decision, are the novel and sinister outgrowth of some abnormal state of things in this state, as was remotely hinted in the argument, and peculiar to Vermont, but are universal as jurisprudence, and fundamental as justice.

The rule to show cause is therefore discharged, and the petition dismissed.

Supreme Court of Ohio.

GAYLORD ET AL. *v.* IMHOFF ET AL.

The members of an insolvent firm are not entitled to the statutory exemptions out of the partnership property after it has been seized in execution by partnership creditors, notwithstanding all the members join in demanding the exemptions.

ERROR to the Superior Court of Cincinnati.

The plaintiffs in error obtained judgment against the defendants Michael Imhoff, Henry Steinegerway and George Pfluger, partners doing business as M. Imhoff & Co.; execution was issued and levied upon a leasehold and machinery belonging to the defendants as co-partners. The defendants severally demanded the statutory exemptions out of the property; but the sheriff, disregarding the demands, sold the property and brought the proceeds into court. The defendants then moved the court to give each of them the sum of $500 out of the money arising from the sale of the property in lieu of the property itself.

On the hearing of the motion, it was agreed between the parties as follows: "That all the property levied on and sold was partnership property, including the leasehold, and that the affidavit and demand of exemption by the defendants were filed with the sheriff before the sale, setting forth that they were heads of families, residents of the state, and not the owners of homesteads or any other property." The motion of the defendants was allowed, and the court ordered the sheriff to pay to each of them, out of the proceeds of the sale in his hands, the sum of $500, in all $1500, and if the proceeds should be insufficient, then to pay to each of the partners one-third of the sum remaining in his hands after the payment of costs.

The plaintiffs excepted to the allowance of the motion and the order of the court thereon, and the rulings of the court in these respects, were assigned for error here.

James R. Challen, for plaintiffs in error.

1. There is no statute in Ohio which allows the judgment-debtors money: 2 Swan & Critchfield 1146, sect. 654. Under similar legislation, the Supreme Court of Pennsylvania so held in *Hammer* v. *Freese*, 19 Penn. St. 255, and so reasoned in *Knabb* v. *Drake*, 23 Penn. St. 489, and New York in *Camrick* v. *Myers*, 14 Barb. 9. In the present case there was no selection of specific articles, no appraisement; nor could there be in the case of partnership property. The partners elected to take the same property, and it was indivisible.

2. The claim is inconsistent with the partnership relation.

(*a.*) Partners are joint tenants.

(*b.*) The interest of the individual partner is in the surplus only, remaining after paying partnership debts.

(*c.*) No partner has an exclusive right in any joint stock, nor does his joint right descend by death; it vests in the survivor until partnership accounts are settled: Story on Part. *in loc.*; *Rogers* v. *Meranda*, 7 Ohio St. 179; *Place* v. *Sweetzer*, 16 Id. 142; *Matlock* v. *Matlock*, 5 Ind. 407.

3. Partnership property is held *in trust*.

(*a.*) For the payment of partnership debts.

(*b.*) For the equitable adjustment of the interests of the co-partners.

4. Dower does not attach to partnership lands. Can surviving partners take a homestead or a year's support while both would be denied to the widow of the deceased partner and his orphan children?

5. The exemption may be waived: *The State* v. *Melogue*, 9 Ind. 196; *Line's Appeal*, 2 Grant's Cas. 198; *Bowman* v. *Smiley*, 31 Penn. St. 225. By putting property into the joint stock of a partnership an individual waives the benefit of the exemption: *Clegg* v. *Houston*, 9 Legal Int. 67; *Bonsall* v. *Comly*, 44 Penn. St. 447.

Matthews & Ramsey, contrà, cited *Stewart* v. *Brown*, 37 N. Y. 350.

GILMORE, J.—The only question that will be considered in this cause is this: Where all the members of an insolvent firm join in the demand, are they entitled to the statutory exemptions out of

partnership property after it has been seized in execution by partnership creditors?

We think not. The section of the statute under which the question arises is as follows: "Sec. 3. That it shall be lawful for any resident of Ohio, being the head of a family and not the owner of a homestead, to hold exempt from levy and sale as aforesaid, personal property to be selected by such person, his agent or attorney at any time before sale, not exceeding five hundred dollars in value in addition to the amount of chattel property now by law exempted. The value of said property to be estimated and appraised by two disinterested householders of the county, to be selected by the officer," &c.: 66 Ohio Laws 50.

The decisions of the courts of other states upon this question, under kindred statutes, are calculated rather to embarrass than satisfactorily aid us in the construction of our own statute.

The confused state of the law on this subject will appear from a reference to the cases mentioned below, of which the effect only is given by way of illustration. *Stewart* v. *Brown*, 37 N. Y. 350, answers the question affirmatively; *Bonsall et al.* v. *Comly*, 44 Penn. St. 442, answers it in the negative; while *Burns* v. *Harris*, 67 N. C., decides that if all the partners consent, the exemption must be allowed to each of the partners; but if such consent is not given then it must be denied to all. There is direct conflict between the New York and Pennsylvania decisions; one or the other is right and must be followed.

But we think the principles laid down by the North Carolina decision wholly untenable. The statute confers a positive right, that in a proper case can be asserted against the world, and this is a dignity that inheres in all positive legal rights. In North Carolina the right is so dwarfed that in the case of partners its exercise becomes a mere privilege depending upon the mutual consent of the partners.

It would be competent for the legislature to declare a right and prescribe the conditions upon which its exercise should depend: but when the statute creates and declares an absolute right, such right cannot be qualified, abridged or extended by judicial interpretation. If, therefore, on a fair construction of the statute, insolvent partners individually or collectively are entitled to the statutory exemptions out of partnership property, as against partnership creditors, let the right be granted and enforced by the court.

If not, let it be denied; and if the law is defective in this respect, let the defect be cured by proper legislation.

Looking alone to the language of the section above quoted, we find nothing to justify the inference that the legislature in passing it intended to provide for other than individual debtors, and for the exemption of their individual property from sale on execution; and when construed in connection with the law relating to partnerships as it had always stood and still stands, we are convinced that it could not have been the intention of the lawmaker to bring partners or partnership property within the operation or provisions of the section in any respect.

Dealing with the statutory right and excluding equitable considerations, which have no place here, our convictions are based upon the fact that the right of exemption and the mode of exercising it prescribed by the statute, are wholly inapplicable to partnership property or the rights of the partners therein, and inconsistent with the rights of their creditors in relation thereto. The statute when applied does not affect the ownership of property in any way, it neither confers, takes away nor changes the debtor's title, by partitioning into severalty that in which there was a joint ownership or otherwise; but when properly invoked, it simply exempts the designated property from execution and leaves the ownership as it was. The language of the section points unmistakably to property owned individually. The selection of the exempted property is to be made by the execution debtor, and the property selected is to be appraised and set off to the debtor. "Partners are joint tenants in their stock in trade, * * * and no partner has an exclusive right to any part of the joint stock:" 3 Kent 37. Conceding that the interest of a partner in the partnership property may be seized in execution for his individual debt; suppose a firm consisting of three or more members and such a seizure in execution of the interest of one of them in the firm property; and suppose such debtor-partner to be demanding the statutory exemption, we cannot see how he could select or the householders appraise and set off partnership property to him if the other partners objected, and even if the other partners were consenting, it is plain that it could only be done by first assigning certain of the goods to him in severalty, which would be obtaining his exemption by contract with the other partners, and not by virtue of the statutory right. But suppose a levy of execution

on the firm property for a firm debt, and a demand for the statutory exemption made by one or two of the partners, and the others objecting to the exemptions being made. There would exist no right of selection by the demanding partners, and no power to set off by the officer, and hence there could be no exemption under these circumstances. The simple machinery of the statute is inapplicable and inadequate to the solution of such complications.

The right to the exemption, therefore, manifestly depends upon the power of selection, and this power must relate either to property of which the execution-debtor is the absolute owner, or to property of which he has the possession and actual control as against the officer holding the execution.

But the court below held that where all the partners demanded the exemption, they were, thereby, all consenting to the exemption, and it should, therefore, be allowed. The difficulties above suggested as to a single partner, or as to some demanding and others objecting to the exemption, arise and are equally potential here. The statute gives no countenance to the idea that there is to be a joint ownership in the property after it is exempted and set off; nor, as has been said, does it contemplate a partitioning into severalty of that which is joint property, in order to get at the property that may be exempted; and in order to get at the joint property to be exempted, where all were demanding it, the consent of all the partners would have to be given to each selection made by any one of them, before it could be exempted and set off. In short, where all were demanding it, the exemptions could only be made with the mutual agreement and consent of all the parties, as to the selection of the joint property to be exempted. The right to make such consents and agreements, would imply either an actual ownership of the property by the partners, or a possession coupled with an absolute power of disposition.

In this case, inasmuch as the partnership property had been seized in execution for a firm debt, before the demands for exemption were made, the legal effect of this seizure upon the property, must be considered in order to ascertain whether a right of slection and exemption by consent of the partners, remained after the seizure.

The law of partnership constitutes a system by itself, which is inapplicable to any other legal relation.

In speaking "of the origin and purpose of partnership," Mr.

Parsons says: "If partnership offers advantages, it also exposes those who enter into it to peculiar liabilities. The safety of society requires this. If every partner were not held absolutely for the whole amount of the debts of the firm, by whichsoever of the partners they were contracted, a wide door would be opened for fraud and public loss. It is, however, a very common thing for persons to try, in a vast variety of ways, to gain all the advantages and profits of partnership, without encountering these liabilities, or to escape from these liabilities when the loss has accrued. This the law forbids, and as far as it can, prevents; and, it must, therefore, be always ready to meet the contrivances, evasions and disguises resorted to by ingenious men:" Parsons on Partnership 4. One of the familiar rules in partnership is, that the partnership property and assets are primarily liable for the payment of partnership debts; and no private creditor of a partner can take by his execution, anything more than that partner's share in whatever surplus remains after the partnership effects have paid the partnership debts. The rule in equity on this point, is thus admirably stated by Mr. Justice STORY; "Joint property is deemed a trust fund primarily to be applied to the discharge of partnership debts, against all persons not having a higher equity. A long series of authorities has established this equity of the joint creditors, to be worked out through the medium of the partners, that is to say, the partners have a right, *inter sese*, to have the partnership property first applied to the discharge of the partnership debts, and no partner has any right, except to his own share of the residue, and the joint creditors are, in case of insolvency, substituted in equity to the rights of the partners as being the ultimate *cestuis que trust* of the fund to the extent of the joint debts:" Story's Eq. Juris., sect. 1253. In the fact, that in connection with this peculiar system, public policy and the prevention of great losses to society require each partner to be held absolutely for the whole amount of the firm debts; and equity, as to the partnership property, regards the partners as trustees holding it for the benefit of their creditors; we find a further reason for presuming that the exemption laws were not intended to apply to or affect partnership property; and we feel warranted in holding, that the levy of the execution in this case, was an absolute appropriation, in law, of the property levied on to the payment of a partnership debt, and

that these partners, being insolvent, had no remaining interest either legal or equitable in the property.

They could not, therefore, after the levy, acquire a right of exemption in the property by mutual agreement or otherwise, without the consent of the firm creditors. And while a court of equity, looking alone to the rights of all the creditors, might, in a case requiring it, have controlled the proceeds of the sale under the levy; it would not, on general principles, have had power to interfere to prevent a sale, or to deprive the plaintiffs of any legal advantages that their levy gave them. It follows that the law having seized and appropriated the property in question to its legitimate purpose—the payment of partnership debts—it was not within the power of a court of equity to take the proceeds of the property from the possession of the law, which held them for a specific purpose, and appropriate them to another.

Although as we have above found the partners were not, and could not be entitled to exemptions, either in severalty, or jointly out of the partnership property, the court below found that the partners were entitled to five hundred dollars each out of the proceeds of the property and declared accordingly.

In this there was error. We think the judgment creditors and not the partners were entitled to the money arising from the sale.

Judgment reversed and cause remanded for further proceedings.

Court of Common Pleas of the City of New York.

JONATHAN N. HAVENS *v.* CHRISTIAN KLEIN.

Where a common owner of two tenements, the windows of one of which overlook the yard of the other, and receive light and air therefrom, its shutters swing out over such yard, and access from its fire-escapes which overhang the yard being had to such yard, severs the same by conveyances to different persons, an easement in favor of the tenement so overlooking the other, it being the one first conveyed, is created in respect to light and air, the swinging of the shutters, and access to and from the fire-escapes.

Such easement is an apparent one. The grantee of the servient tenement, the one later conveyed, is deemed to have actual notice of such easement, and takes his title subject thereto.

In such case it is immaterial whether such severance be by deed or mortgage, inasmuch as by foreclosure the mortgage is ripened into a deed.

PLAINTIFF was the owner of premises in New York city, situated on the north side of 50th street, sixty feet west of Lexington

avenue, and being twenty feet in width by forty-nine feet deep. Defendant owned premises on the west side of Lexington avenue, forty-nine feet north of 50th street, twenty feet in width and eighty feet deep. A house on plaintiff's lot (a French flat), extended the whole depth of his lot. A house on defendant's lot, likewise a French flat, extended sixty feet deep; so that the northeasterly corner of plaintiff's house impinged the southwesterly corner of defendant's house.

Plaintiff's house had five stories, with three windows in each, looking out over the yard belonging to defendant. These windows each had shutters which swung out over defendant's said yard; and in the angle of the houses were built fire-escapes for each story, for the mutual use of each house, access thereto being had from the windows of the same.

These premises, in the state described, *had at one time been owned by a common owner*, one Buddensick, who while owner of both lots had, in 1871, built the houses in the manner stated. He thereafter mortgaged both, executing the mortgage upon the 50th street house first. It was also recorded first. This mortgage contained the usual grant of said premises with all the "rights, privileges, hereditaments and *appurtenances* thereunto belonging." Both mortgages were in time foreclosed; and under the decrees in foreclosure and sundry mesne conveyances the title to the 50th-street house became vested in plaintiff, that to the Lexington avenue house in defendant.

In November 1874, defendant built in his said yard, *close* to plaintiff's house, but upon his own land, a scaffolding forty-five feet high, upon which, opposite each of plaintiff's windows, he affixed boarding flat up against the wall of plaintiff's house, in such a manner that none of the shutters of plaintiff's rear windows could be opened; access to the fire-escapes out of the windows was prevented, and all light and air through the windows excluded, and the value of the house in that state as an inhabitable dwelling reduced to almost nothing.

Upon these facts the plaintiff brought this action to restrain the defendant from continuing such obstructions, and to have his right to light and air through such windows from defendant's land, and to swing his shutters on defendant's land, and to have access undisturbed to said fire-escapes declared and enforced, and for a perpetual injunction.

According to the practice of the state of New York, an order to show cause why an injunction should not be granted pending the action was obtained, with a temporary injunction meantime, and on the return of such order defendant appeared to show cause and moved to vacate the temporary injunction, plaintiff moving to make it permanent.

Nelson Smith and *John Brooks Leavitt*, of counsel for plaintiff, cited: *Lampman* v. *Mills*, 21 N. Y. 505; *Voorhees* v. *Burchard*, 55 N. Y. 98; *Butterworth* v. *Crawford*, 3 Daly 57, s. c. 46 N. Y. 349; *Webster* v. *Stevens*, 5 Duer 553; *Eno* v. *Del Vecchio*, 6 Duer 17; *Hendricks* v. *Stark*, 37 N. Y. 106; *Compton* v. *Richards*, 1 Price 27; *Pyer* v. *Carter*, 1 Hurlst. & N. 916; *Rivieri* v. *Bower*, 1 Russell & Milnes 24; 3d Blackst. 218; F. N. B. 183; 2 Rolle's Abr. 140; Wash. on Easm. 492, 575–7; 2 Story Eq. § 925–6; 1 Fonbl. Eq. 3 note; 2 Wash. Real Prop. 316–19; *Myers* v. *Gemmel*, 10 Barb. 543; *Story* v. *Odin*, 12 Mass. 157.

Julius J. Frank, of counsel for defendant, cited: *Mahan* v. *Brown*, 13 Wend. 261; 2 Wash. Real Prop. 316–319; *Pickard* v. *Collins*, 23 Barb. 444; *Bury* v. *Pope*, Cro. Eliz. 118; *Palmer* v. *Wetmore*, 2 Sanf. 316; *Parker* v. *Foote*, 19 Wend. 309; *Myers* v. *Gemmel*, 10 Barb. 537; *Hoffman* v. *Armstrong*, 46 Barb. 337; *Relyea* v. *Beaver*, 34 Barb. 547; *People* v. *Central Railroad Co.*, 42 N. Y. 283; *Collier* v. *Pierce*, 7 Gray 18; *Pheysey* v. *Vicary*, 16 M. & W. 484; *Johnson* v. *Jordan*, 2 Met. 234; *Cartrey* v. *Willis*, 7 Allen 364; *Randall* v. *McLaughlin*, 10 Allen 366; *Brakely* v. *Sharp*, 1 Stockton Ch. 9; s. c. Id. 206.

DALY, C. J.—Much of the law discussed upon this motion has in my judgment no bearing upon the question which arises in the case. It is settled in this state that no right to the use of light and air in a building overlooking the land of another is acquired by use, enjoyment or pre-emption. It can pass only by express grant or covenants, and will not pass by implication of a grant (2 Washburn on Real Property 319, 3d ed. 839), unless it is necessary to the enjoyment and was clearly intended from the circumstances existing at the time when the conveyance was made: *Voorhees* v. *Burchard*, 55 New York 98; *Comstock* v. *Johnson*, 46 Id. 6, 15; *Huttermeyer* v. *Albro*, 18 Id. 48; *Nicholas* v. *Chamberlain*, Cro.

Jac. 121; *New Ipswich Factory* v. *Batchelder*, 3 N. H. 190; *United States* v. *Appleton*, 1 Sumner 492.

The two lots in this case originally belonged to the one owner; the lot on the westerly side of Lexington avenue extending back 80 feet, so as to meet the rear of the lot, on the northerly side of Fiftieth street, along which lot the rear of the Lexington street lot extended for 20 feet. On the Fiftieth street lot the then owner erected a building covering the whole of that lot as it now exists, in the rear of which lot he placed windows for light and air overlooking the rear of the Lexington street lot, and on the Lexington street lot he erected a building 60 feet deep for which the rear of the lot for the remaining 20 feet served as a yard, which yard was overlooked by the windows of the building on the Fiftieth street lot and in the yard he erected a fire-escape for the joint use of the two buildings.

The two lots were severed by the foreclosure of mortgages given by the owner and the sale of the lots, as separate lots; under which sales the plaintiff has become the owner of the Fiftieth street lot and the defendant of the Lexington avenue lot. The defendant claiming the right to the exclusive use of the yard, has erected a wooden fence, by which he has cut the plaintiff off from the use and enjoyment of the windows in the rear of the building on the Fiftieth street lot, and also from the use of the fire-escape.

The question in the case is, whether the plaintiff at the severance of the two lots had a right to the light and air from the windows in the rear of his building and to the use of the fire-escape, of which the defendant could not deprive him, and it appears to me that the case comes clearly within the rule illustrated by SELDEN, J., in *Lampman* v. *Mills*, 21 N. Y. 511. "If," says Judge SELDEN, "both proprietors obtained their title from a common source, the same grantor having conveyed the tenement with the windows to one and the ground overlooked to another, the windows cannot be obstructed, and the reason is, that the relative qualities of the two tenements must be considered as fixed at the time of their severance; each retains, as between it and the other, the properties then *visibly* attached to it, and neither party has the right afterwards to change them;" for which he relies on *Cox* v. *Matthews*, Ventris 237, a case which fully bears out what he states.

The rule of the common law is, says Judge SELDEN, that where the owner of two tenements sells one of them, the purchaser takes

the tenement sold with all the benefits and burdens *which appear* at the time of the sale to belong to it as between it and the property which the vendor retains; which he adds is one of the recognised modes by which an easement or servitude is created. If the burden he remarks is *open* and *visible*, the purchaser takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has the right by altering arrangements then *openly existing* to change materially the relative value of the respective parts.

In the subsequent case of *Butterworth* v. *Crawford*, 46 N. Y. 349, the judgment of this court was reversed solely upon the ground that the servitude was not open and visible.

The rule above stated was not questioned; but the decision was put upon the ground that there must be some mark or sign, which would indicate the existence of the servitude to one reasonably familiar with the subject, upon an inspection of the premises, for in the present case the right which was claimed was open and visible, as it was the windows in the rear of the house on the Fiftieth street lot and the fire-escape which had been built for the joint use of both houses.

In *Robbins* v. *Barnes*, Hob. 131, the two adjoining houses were so built that one overhung a portion of the other, and although this overhanging was originally wrongful, yet as both houses afterwards became the property of one person and through him were divided, it was held that they were taken as they were at the time of the conveyance by which they were severed and that the owner of the house which overhung was entitled upon taking it down to rebuild the new house so as to overhang in the same manner, and it has been recognised in several cases, that if one owning a house with windows looking out upon adjoining land of his own, sell such house, he cannot afterwards build upon the adjoining land, so as to stop or obstruct the light of such windows: *Story* v. *Odin*, 12 Mass. 157; *Grant* v. *Chase*, 17 Id. 443; *Cherry* v. *Klein*, 11 Md. 24; 2 Washburn on Real Property 318; 3d ed. pl. 36 and note.

It can make no difference in the application of this rule whether the severance took place by a direct grant from the owner, or arose by the transfer of his interest upon foreclosure sale, for the reason of the rule applies as much in the one case as in the other. The

question is what each party got on the severance. Did the purchaser of the Lexington avenue lot, who bought as would appear from the pleadings after the plaintiff purchased, take that lot subject to the plaintiff's right to the joint use of the fire-escape and to the use of the windows in the rear of the building for light and air?

In my judgment he did, and I shall therefore deny the motion to dissolve the injunction.

Supreme Court of Missouri.

ELIZABETH A. MATTHEWS v. THOMAS SKINKER ET AL.

A national bank has no power to take a mortgage as security for the loan of money (except in certain specified cases to secure previously existing debts), and if it does so, the mortgage is void and proceedings upon it will be enjoined.

Corporations having only the powers expressly given by their charters or the law under which they are incorporated, or such as are necessarily implied, must follow strictly the mode of action prescribed by the law.

The National Bank Act not only fails to authorize, but expressly prohibits the banks from dealing in real estate securities, except in certain specified cases to secure debts previously due.

ERROR to the St. Louis Circuit Court. The facts appear in the opinion, which was delivered by

WAGNER, C. J.—The error complained of in this case is the action of the court in rendering a perpetual injunction restraining the trustees from selling the plaintiff's property. From the record it appears that the plaintiff executed her note payable to Sterling Price & Co. for $15,000, due two years after date, and to secure the payment of the note she made a deed of trust, bearing even date with the same, on certain real estate belonging to her. The note and deed of trust were delivered to Sterling Price & Co., who afterwards transferred them to the Union National Bank of St. Louis, a banking institution organized under the Act of Congress, to secure a loan for $15,000, advanced to Price & Co. by the bank. Price & Co. failing to pay the money advanced on the note and secured by the deed of trust, the trustees at the request of the bank advertised the property for sale, and the plaintiff filed her petition to enjoin the trustees and the bank from proceeding with the sale. Whether the deed of trust in the hands of the bank amounted to a valid security, which could be enforced in payment of the money

advanced, depends upon the construction of the Act of Congress providing for the formation of national banking associations (Rev. St. U. S., p. 998). By section 5, 136 of the Revised Statutes, authority is given to the banking associations "to exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on *personal* security," &c. By section 5, 137, it is provided that: "A national banking association may purchase, hold and convey real estate for the following purposes, and for no other: First, such as shall be necessary for its immediate accommodation in the transaction of its business. Second, such as shall be mortgaged to it in good faith by way of security for debts *previously* contracted. Third, such as shall be conveyed to it in satisfaction of debts *previously* contracted in the course of its dealings. Fourth, such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts due to it."

The act, as will be thus seen, gives the association power to loan money on personal security, and to purchase, hold and convey real estate in certain specified cases. The general principles defining the extent and mode of exercise of corporate powers are well settled and have often been passed upon by this court. Corporations have only such powers as are specially given by their charters, or are necessary to carry into effect some specified power: *St. Louis* v. *Russell*, 9 Mo. 507; *Blair* v. *Perpetual Ins. Co.*, 10 Id. 559; *Ruggles* v. *Collier*, 43 Id. 353. They must act strictly within the scope of the powers conferred on them by the act calling them into being; and where a grant of power from the legislature is relied on, the mode prescribed in that grant for doing any particular thing must be pursued according to the law creating them: *Han. & St. J. Railroad Co.* v. *Marion County*, 36 Mo. 294. The distinction between natural persons and corporations is, that while the former may make any contract not prohibited by law or against public policy, the latter can exercise no powers not expressly conferred on them by their charters: *Bank of Louisville* v. *Young*, 37 Mo. 398. In *Great Eastern Railway* v. *Turner*, L. R. 8 Ch. App. 152, Lord Chancellor SELBORNE gave a brief and compre-

hensive statement of the law applicable to questions of corporate powers. He said, "The company is a mere abstraction of law. All that it does, all that the law imputes to it as its act, must be that which can be legally done, within the powers vested in it by law. Consequently an act which is *ultra vires*, and unauthorized, is not an act of the company, in such a sense, as that the consent of the company to that act can be pleaded."

As this case depends upon the interpretation of a national statute we may refer to some of the cases in United States Supreme Court, to see what view that tribunal has taken of the law concerning the powers of corporations.

In the *Bank of the United States* v. *Danbridge*, 12 Wheat. 64, the rule is stated to be, that, "whatever may be the implied powers of aggregate corporations by the common law, and the modes by which these powers are to be carried into operation, corporations created by statute must depend, both for their powers and the mode of exercising them, upon the construction of the statute itself."

In *Head* v. *Providence Insurance Co.*, 2 Cranch 127, Chief Justice MARSHALL defined the powers and limitations of statutory corporations with great clearness, as follows: "Without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may be correctly said to be precisely what the incorporating act has made it: to derive all its powers from that act and to be capable of exerting its faculties only in the manner the act authorizes."

Judge STRONG, now of the Supreme Court of the United States, in delivering the opinion of the Pennsylvania Supreme Court, in a case where the National Banking Law was directly brought in question, said: "The bank is a creature of the act, dependent on it for all its powers, and controlled by all the restrictions which the act imposes:" *Venango Nat. Bank* v. *Taylor*, 56 Penn. St. 15.

In all the cases where questions have been raised respecting the powers and liabilities of national banks, it has been invariably held that the banks have only the powers conferred upon them in the act providing for their formation; that from that act they derive their sole authority; and that they must be strictly governed by it and kept within the line of its limitations. In *Wiley* v. *The*

First National Bank of Brattleboro, 14 Am. Law Reg. N. S. 342, it was decided that the taking of special deposits, to keep merely for the accommodation of the depositor, was not within the authorized business of banks organized under the Act of Congress, and that the cashiers of such banks had no power to bind them on any express contract accompanying, or on any implied contract arising out of such thing. So, in a recent case in Maryland (*Weckler* v. *The First Nat. Bank of Hagerstown*, 14 Am. Law Reg. N. S. 609), it was held that in the act authorizing the incorporation of national banking associations, the kind of banking was limited and defined, and as the act contained no grant of power to engage in bond-brokerage, it was, therefore, prohibited to the banks, and that it was not necessary to the purpose of their existence, or in any sense incidental to the business of banking. It was, accordingly, decided that in an action of deceit against a national bank, seeking to recover damages for the alleged fraudulent representations of its teller made in the sale to the plaintiff of certain railroad bonds, that the business of selling bonds on commission was not within the scope of the powers of national banking associations, and that the bank could not under any circumstances carry it on, and being thus beyond its corporate powers, the defence of *ultra vires* was open to it, and that it was not responsible for any false representations made by its teller by which the plaintiff might have been damaged.

The very question which comes up for adjudication in this case was presented and passed upon in *Fowler* v. *Scully*, 72 Penn. St. 456. In that case Fowler, without any previous indebtedness, gave to the First National Bank of Pittsburgh a mortgage to secure the bank for notes, &c., thereafter to be discounted for him. Upon proceeding for foreclosure the court decided that lending money by a national bank on mortgage or real estate security was *ultra vires* and forbidden, and the mortgage was declared to be void.

National banks possess just such powers as the act incorporating them gives to them—no more. They are the creatures of the act, and controlled by all its restrictions and limitations. Express power is given to them to "carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by buying and selling exchange, coin and bullion; by loaning money on *personal* security; by obtaining, issuing and circulating notes according to the provi-

sions of the act." Banks are formed and organized for commercial purposes, and not to deal in real estate. Their business is to discount and negotiate promissory notes, drafts, bills of exchange and other evidences of debt, the buying and selling of bills, bullion and lending of money on personal security. To permit them to loan their money on real estate security would be destructive of their efficiency and defeat the object had in view in their creation. Instead of being agents for purposes of trade, dealing in commercial paper, discounting notes and furnishing the necessary facilities for loans, they would have their capital locked up in landed property, and thus be powerless to carry on the business which induced their organization. These speculations in real estate are also hazardous and have no legitimate connection with the business of banking; they require the employment of outside parties to look after the land and examine titles and are apt to embark the banks in enterprises which sooner or latter will end in insolvency. Congress doubtless had these considerations in view, when it provided that the money should be loaned on personal security. When the mode of personal security was declared and pointed out, that excluded all others, for the maxim *expressio unius est exclusio alterius*, must prevail in this case.

But the intention does not rest merely on the provision requiring personal security on loans. Section 5137 specifies for what purposes national banking associations may hold and convey real estate, and forbids their dealing in that kind of property for any other purpose. They may purchase and hold so much real estate as may be necessary for their immediate accommodation in the transaction of their business; such as may be mortgaged to them in good faith by way of security for debts previously contracted; such as shall be conveyed to them in satisfaction of debts previously contracted in the course of their dealings, and such as they shall purchase at sales under judgments, decrees or mortgages held by them, or shall purchase to secure debts already due. These are the specified instances, and the only instances, in which it is permissible for national banking associations to purchase or hold real property. Aside from the real estate necessary for the transaction of their business they can only acquire that description of property, to enable them to secure themselves for debts previously contracted. But in no case can they loan money on the faith of real estate security, where the debtor was not previously indebted to them.

If they do, the security taken is *ultra vires* and void, and may be pleaded by the party as a defence against its enforcement.

The case at bar shows that there were no previous dealings between the plaintiff and the bank; the bank loaned the money and took the deed of trust as security. This it had no power to do, and the judgment of the court below will be affirmed.

Supreme Court of Rhode Island.

REBECCA PERKINS *v.* REBECCA PERKINS, ADMINISTRATRIX.

An executor or administrator cannot bring suit against himself for a debt due him by his decedent.

ON demurrer to plea in abatement.

Dexter B. Potter, for Rebecca Perkins.

Tillinghast & Ely, for administrator *de bonis non*, intervening.

The opinion of the court was delivered by

DURFEE, C. J.—This is an action of assumpsit to recover for services performed, and for care, provisions, and clothing furnished by the plaintiff to Jacob Perkins and his wife, during the lifetime of said Jacob. The plaintiff was administratrix on the estate of said Jacob, and commenced the action by service of the writ upon herself as such. She declared against herself as administratrix. The first plea is a plea in abatement. It was filed by Nathan M. Lockwood, and sets forth that he has been appointed administrator on the estate of said Jacob, in place of the plaintiff, who has resigned. It prays that the writ may abate, because the plaintiff and the defendant named in the writ are the same person. The plaintiff demurs. Nathan M. Lockwood joins in the demurrer.

The plaintiff does not cite any case to show that the action can be maintained. It is not the ordinary common law remedy. The ordinary common law remedy is retainer. Blackstone says: "If a person indebted to another makes his creditor his executor, or if such creditor obtains letters of administration to his debtor; in these cases the law gives him a remedy for his debt by allowing him to *retain* so much as will pay himself, before any other creditors whose debts are of equal degree. This is a remedy by the mere act of law, and is grounded on this reason: that the executor cannot, without an apparent absurdity, commence a suit against himself, as a representative of the deceased, to recover that which is due to him in his own private capacity; but, having the whole